Supreme Court, U.S.
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No. 94-1889

In The

Supreme Court of the United States

October Term, 1994

GAETANO MIELE and DOROTHY MIELE, husband and wife, MARGUERITE CHERIPKA, Individually and on behalf of the Estate of James Cheripka,

Petitioners,

vs.

PERINI CORPORATION, MERIDIAN MORTGAGE CORPORATION, STEVENS & WILKINSON, INC., ATLANTIC PALACE CONDOMINIUM ASSOCIATION and METALAN ERECTORS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT METALAN ERECTORS, INC.

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STATEMENT OF THE CASE

This litigation arises out of the construction of a 293 unit condominium hotel in Atlantic City, New Jersey known as the "Atlantic Palace". Petitioners purchased condominium units at this project, and thereafter filed suit seeking damages for water infiltration problems throughout the Atlantic Palace building. United States Magistrate Judge Joel B. Rosen noted petitioners' suit was based solely on negligence theories of recovery. (PA 16A-PA 17A).[1] Petitioners failed to plead any theories of fraud or violation of federal law in their complaint. Jurisdiction of the United States District Court for the District of New Jersey, for the numerous actions filed as a result of this construction project, was based solely upon diversity of citizenship under 28 U.S.C. § 1332. The District Court granted petitioners the right to intervene in these matters.

Respondent Metalan Erectors, Inc. ("Metalan") performed work as a sub-sub-contractor on the Atlantic Palace project. Metalan's contractual duties required that it install metal window frames, sliding glass doors, a slope wall and a curtain wall at various floors of the condominium hotel. Metalan did not take part in the sale or advertising of the Atlantic Palace condominium units. Metalan is a fourth party defendant in petitioners' suit.

Following the close of discovery, the direct and third party defendants filed motions for summary judgment. Defendants based these motions on petitioners' failure to produce expert evidence to support their claims for professional malpractice against the architects and contractors of the Atlantic Palace project. Petitioners' original attorney conceded to the U.S. Magistrate Judge that New Jersey law required expert opinion

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1. The designation "PA" refers to petitioners' appendix. The specific page number referred to follows the designation.

testimony to support petitioners' claims. He further conceded that petitioners had not retained an expert for that purpose nor did they intend to do so. (PA21A-PA22A).

Due to the absence of expert evidence, the U.S. Magistrate Judge recommended the granting of summary judgment against petitioners. (PA39A-PA40A). Joseph E. Irenas, U.S.D.C., granted summary judgment on June 25, 1993. (PA7A-PA10A). The grant of summary judgment in favor of the defendants extinguished all claims against Metalan with the exception of one claim for indemnification which Metalan settled. The United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court on December 29, 1994. (PA3A-PA4A).

SUMMARY OF THE ARGUMENT

I. Petitioners filed suit based solely on New Jersey common law theories of negligence. This matter does not involve a question of federal law or require this Court to settle differing interpretations of federal law within the circuit courts of appeal. This Court should not exercise its discretion to review this matter.

II. New Jersey common law requires petitioners to produce expert evidence to support their claims for negligence against a professional. Summary judgment was properly granted against petitioners due to the absence of any expert evidence to support their claims.

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD NOT EXERCISE ITS DISCRETION AND REVIEW A GRANT OF SUMMARY JUDGMENT BASED UPON NEW JERSEY NEGLIGENCE LAW.

In support of their petition for writ of certiorari, petitioners argue that the decision of the Third Circuit Court of Appeals conflicts with the decisions of other circuit courts of appeal with regard to federal law. Specifically, petitioners allege that the Third Circuit incorrectly interpreted 18 U.S.C. § 1341 and the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701 through 1720. These assertions, however, are incorrect.

Petitioners fail to disclose that the suit filed in the United States District Court for the District of New Jersey did not allege statutory or common law fraud against any defendant. Petitioners' claims at the trial level proceeded solely on theories of negligence against the individuals responsible for the design, construction and supervision of the Atlantic Palace condominium project. Contrary to petitioners' assertion, it was not "plain that the petitioners' case was brought for defendants' fraud and non-disclosure." Petitioners sought relief solely for the alleged negligence of defendants and based solely on the tort law of the State of New Jersey. In fact, the petitioners first raised a claim of fraud on appeal to the United States Court of Appeals for the Third Circuit. At that time petitioners sought relief from the grant of summary judgment based upon New Jersey common law theories of fraud in the sale of real estate. Petitioners did not allege any violation of federal law at that time. Therefore, the Third Circuit could not have incorrectly decided an issue of federal law or made a decision contrary to other circuit courts of

appeal. Simply, no claim requiring interpretation of federal law was before the Third Circuit Court of Appeals. The only claim properly before the Third Circuit was the alleged error of the District Court in granting summary judgment based upon New Jersey negligence law. The Third Circuit determined that the District Court properly granted summary judgment and this Court should not exercise discretion to review that determination.

Alternatively, should this Court grant review of this matter based upon the asserted error in the interpretation of federal statutes governing fraud, respondent Metalan requests that this matter be limited solely to that issue. Respondent Metalan took no part in the advertising or sale of condominium units at the Atlantic Palace project. Metalan requests that, should this Court grant certiorari, it be limited solely to petitioners' claim regarding the fraudulent sale of condominium units and they not be required to participate in any further litigation in this matter.

II.

THE THIRD CIRCUIT COURT OF APPEALS PROPERLY AFFIRMED THE GRANT OF SUMMARY JUDGMENT AGAINST PETITIONERS' CLAIMS BASED ON NEGLIGENCE.

A court may grant summary judgment only when the materials of record show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Tudor Dev. Group Inc. v. United States Fidelity & Guaranty Co.*, 968 F.2d 357, 359-360 (3d Cir. 1992). A motion for summary judgment must be granted if the party opposing the motion "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrept*, 477 U.S. 317, 322 (1986).

In this case it was essential for petitioners to establish, through expert evidence, negligent conduct of the respondents. Petitioners alleged in their complaint negligent construction, design, supervision and failure to discover defects in a timely fashion. Petitioners asserted these claims against the general contractor and architect on the Atlantic Palace condominium project. Petitioners were required to produce expert evidence in support of these claims. In a professional malpractice action, New Jersey law requires expert testimony from a member of defendant's professional group to establish deviation from the accepted standard of professional care. *Sanzari v. Rosenfeld,* 34 N.J. 128 (1961); *Walker Rogge v. Chelsea Title and Guaranty,* 222 N.J. Super. 363, 375-376 (App. Div. 1980), *reversed on other grounds,* 116 N.J. 517 (1989); *Travelers Indemnity Co. v. Ewing, Cole, Erdman & Eubank,* 711 F.2d 14, 17 (3d Cir. 1983). Without such testimony, plaintiff cannot sustain its burden of establishing a *prima facie* case of negligence against a professional. *Walker Rogge v. Chelsea Title & Guaranty,* 222 N.J. Super. at 375.

In this case petitioners' original attorney conceded that he was required to retain an expert to proceed with petitioners' claims at the trial court level. Petitioners' original attorney further conceded that he had not retained an expert for that purpose nor did he intend to do so. Petitioners, therefore, conceded that they could not put forth the necessary proofs to prevail at trial. In light of this clear lack of evidence in support of petitioners' claims, the District Court properly granted summary judgment. The Third Circuit Court of Appeals properly affirmed this determination.

CONCLUSION

For the foregoing reasons, respondent Metalan Erectors respectfully requests that this Court deny a writ of certiorari on this matter. Alternatively, respondent Metalan Erectors requests that if this Court grants certiorari as to petitioners' claim of fraud in the sale of condominium units, it be limited solely to that issue and they be removed from any further participation in this matter.

Respectfully submitted,

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